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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

PEOPLE OF THE STATE OF MICHIGAN, PETITIONER,

VS.

OTIS LEE SMITH, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED FOR REVIEW?

1. Where the Defendant in the State Court foregoes bringing a motion to quash the Information prior to the attachment of jeopardy, and knowingly allows himself to be placed in jeopardy before raising the motion, and where the identical grounds for the motion were raised by Defendant at the preliminary examination before the case was bound over to Circuit Court for trial, has the Defendant waived the double jeopardy bar to reprosecution.

2. Does the granting of Defendant's motion to dismiss by a trial judge in a State court after a jury has been impaneled constitute an acquittal within the meaning of that term under the common law and, thus, bar retrial under the double jeopardy clause?

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980
No.

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
v
OTIS LEE SMITH,
Respondent.

APPEARANCE

The Clerk will enter my appearance as counsel for the People of the State of Michigan, who in this Court is Petitioner.

I certify that I am a Member of the Bar of the Supreme Court of the United States:

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Dated: January 6, 1981

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PETITION FOR A WRIT OF CERTIORARI

The People of the State of Michigan, Petitioner, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above entitled cause on October 20, 1980.

CITATION OF OPINIONS BELOW

Michigan Supreme Court. The Order denying Petitioner's application for leave to appeal was entered October 20, 1980 and is reported at 409 Mich 934. Appendix A.

Michigan Court of Appeals. The opinion of the Michigan Court of Appeals dated April 16, 1979 is reported at 89 Mich App 478; 280 NW2d 862 (1979). Appendix B.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on October 20, 1980.

The jurisdiction of this Court is invoked under 28 USC 1257(3).

QUESTIONS PRESENTED FOR REVIEW?

1. Where the Defendant in the State Court foregoes bringing a motion to quash the Information prior to the attachment of jeopardy, and knowingly allows himself to be placed in jeopardy before raising the motion, and where the identical grounds for the motion were raised by Defendant at the preliminary examination before the case was bound over to Circuit Court for trial, has the Defendant waived the double jeopardy bar to reprosecution.

2. Does the granting of Defendant's motion to dismiss by a trial judge in a State court after a jury has been impaneled constitute an acquittal within the meaning of that term under the common law and, thus, bar retrial under the double jeopardy clause?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution for the United States of America, Amendment V:

> . . . Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

The Respondent, Otis Lee Smith, was charged by complaint and warrant with the offenses of Assault With Intent to Commit Murder, MCL 750.83; MSA 28.278, Possession of a Firearm in the Commission of a Felony, MCL 750.227(b); MSA 28.424(2), and Prison Escape, MCL 750.193; MSA 28.390.

A preliminary examination on these charges was held in District Court on June 6, 1977. At the conclusion of the testimony Respondent's counsel argued that since the victim of the assault knew that the gun used in the assault was unloaded an assault had not been shown. (PET p 20). Appendix F. The District Judge bound the Defendant over to Circuit Court on the charges of Assault With Intent to Commit Murder, Possession of a Firearm in the Commission of a Felony, and Prison Escape. The District Court also added a fourth count of Attempted Murder, MCL 750.91; MSA 28.286, based on the testimony at the examination and bound the Defendant over to Circuit Court on that charge also. (PET pp 22-23). The action of the District Court Judge in adding a

count based on the evidence at the examination was proper under MCL 766.4; MSA 28.922. *Yaner* v *People*, 34 Mich 286 (1876), *People* v *Hutchinson*, 35 Mich App 129; 92 NW2d 395 (1971).

While this case was awaiting trial in Circuit Court the Respondent made no motion to quash the Information on the basis that the evidence produced at preliminary examination failed to establish an assault.

Trial commenced in the Circuit Court on all four counts on October 17, 1977. Respondent, an inmate of the State Prison of Southern Michigan had been transferred to a hospital for medical treatment. (T p 9). On the date of the offense, a prison guard had transferred another inmate to the same ward in the hospital as the Respondent. (T p 8). Once the guard brought this inmate into the hospital he entered the restroom to the ward and unloaded his revolver. No one was present when the guard unloaded his weapon nor did the guard inform anyone that he had unloaded his weapon. (T p 11). An altercation then occurred in the ward resulting in the Respondent pulling the guard's revolver out of its holster (T p 9), pointing the revolver at the guard (T p 12), and pulling the trigger twice. (T p 13).

At the close of the People's proofs the trial court granted Defendant's motion to dismiss the charge of Assault With Intent to Commit Murder on the basis that the guard, knowing that the revolver to be unloaded, knew that the Defendant did not have the means to assault him and that, therefore, an assault had not occurred. (T p 96). The trial court also granted Defendant's motion to dismiss the Attempted Murder charge, the Court ruling that the acts of the Defendant in pointing the revolver and pulling the trigger did not fall within the nature of the acts listed in MCL 750.91; MSA 28.286 of "poisoning, drowning, or strangling". (T pp 104-106).

The trial court instructed the jury on the possible verdicts of Attempted Prison Escape and Possession of a Firearm in the Commission of a Felony. (T pp 150-152). The Court overruled the prosecution's objections that Attempted Escape is incorporated in the prison escape statute and not governed under the general attempt statute, MCL 750.92; MSA 28.287, which reduces the penalty by half. (T pp 153-155, 144-147). The jury could not agree on the verdict and the trial court declared a mistrial and discharged the jury. (T p 159).

The prosecution applied for leave to appeal to the Michigan Court of Appeals from the trial court's order dismissing the charges of Assault With Intent to Commit Murder, Attempted Murder, and Escape. The Michigan Court of Appeals granted leave to appeal and on August 8, 1978 issued an opinion holding that the Circuit Court had clearly erred in dismissing the Assault With Intent to Murder and in reducing escape to Attempted Escape. The case was remanded for trial. On September 11, 1978 the Court of Appeals issued an order *sua sponte* granting a rehearing and directing counsel to:

> "Discuss the double jeopardy ramifications of the relief ordered in this Court's August 8, 1978, opinion in this cause: *Burks* v *United States*, ____ US ____; 98 S Ct 2141; 57 L Ed 2d 1 (1978), *Sanabria* v *United States*, ____ US ____; 98 S Ct 2170; 57 L Ed 2d 43 (1978), *United States* v *Scott*, ____ US ____; 98 S Ct 2187; 57 L Ed 2d 65 (1978), *People* v *Keith Lester*, 78 Mich App 661; 261 NW2d 33 (1977), *People* v *Killingsworth*, 80 Mich App 45; 263 NW2d 278 (1977)."

On rehearing the Court in *People* v *Otis Lee Smith*, 89 Mich App 478; 280 NW2d 862 (1979) held that the charges of Assault With Intent to Commit Murder and Attempted Murder defined "mutually exclusive crimes" and stated that

insofar as the evidence amply demonstrated that the Defendant tried to murder the prison guard, he necessarily violated one of the statutes. The Court ruled that the evidence presented was sufficient to establish an assault and that the trial court erred by refusing to instruct the jury on the charge of Assault With Intent to Commit Murder. The Court of Appeals also ruled that the trial judge erred in instructing the jury on attempted escape rather than escape.

The Michigan Court of Appeals went on to rule, however, that the trial court's erroneous ruling regarding the Assault With Intent to Commit Murder and Prison Escape charges nonetheless amounted to acquittals on the merits, citing *United States* v *Scott*, 437 US 82; 98 S Ct 2187; 57 L Ed 2d 65 (1978), *Sanabria* v *United States*, 437 US 54; 98 S Ct 2170; 57 L Ed 2d 43 (1978), *Fong Foo* v *United States*, 369 US 141; 82 S Ct 681; 7 L Ed 2d 629 (1962).

The prosecution applied for leave to appeal to the Michigan Supreme Court and that Court by an order certified October 20, 1980 denied the appli ation for leave to appeal.

REASONS FOR GRANTING THE WRIT

This Court in *Serfass* v *United States*, 420 US 377, 394; 43 L Ed 2d 265; 95 S Ct 1055, 1065 (1975) reserved ruling on a hypothetical case of a defendant who was afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allowed himself to be placed in jeopardy before raising the defense. In Justice Brennen's dissenting opinion, joined by Justices White, Marshall, and Stevens, in *United States* v *Scott*, 437 US 82, 112; 57 L Ed 2d 65, 88; 98 S Ct 2187 (1978) it is stated:

> It perhaps might not be objectionable to permit retrial of a defendant whose first trial was ter-

> minated on the basis of a midtrial ruling on a motion that could — because it did not depend upon the facts introduced at trial — have been raised before jeopardy attached . . .

In *Lee* v *United States*, 432 US 23; 53 L Ed 2d 80; 97 S Ct 2141 (1977) it was held that retrial was not barred by double jeopardy where the defendant's last minute timing of the motion and failure to impress upon the Court the importance of a ruling before being placed in jeopardy did not raise a double bar to reprosecution even though the Court's granting of the defendant's motion was done after jeopardy attached. 53 L Ed 2d at 89-90. Justice Brennen's concurring opinion in *Lee* emphasized that an entirely different case would have been presented if the Petitioner had afforded the trial judge ample opportunity to rule on his motion prior to trial. Id., 432 US at 35; 53 L Ed 2d at 90.

In the instant case, the charge against Respondent of Assault With Intent to Commit Murder was premised on the Defendant's action of pointing and pulling the trigger of a gun which the victim of the assault knew to be unloaded. At the conclusion of the preliminary examination in the instant case, counsel for the Defendant argued that since the prison guard testified that he knew the gun used by the Defendant was unloaded an assault had not occurred. (PET p 20). Appendix F. After the Defendant was bound over to Circuit Court to stand trial on the assault charge, however, the Defendant at no time while the case was pending trial made any motion to quash the Information on the basis that the evidence at the preliminary examination did not support the assault count in the Information.

Under Michigan practice, the Information filed in Circuit Court is based on the examining magistrate's return after examination and the evidence adduced at the preliminary examination. *People* v *Dochstader*, 274 Mich 238; 264 NW 356

(1936), *People* v *Burd*, 13 Mich App 307; 164 NW2d 392 (1968). If the evidence at the preliminary examination does not support a charge contained in the Information, then the Information is faulty, the Circuit Court has no jurisdiction over that case and the Circuit Court would be required to grant a motion to quash the Information. *Barnard* v *Judge of Superior Court*, 199 Mich 227, 230-231; 165 NW 833 (1917), *Genesee County Prosecutor* v *Genesee Circuit Judge*, 391 Mich 115; 215 NW2d 145 (1974) Rather than moving to quash the Information in Circuit Court, however, the Defendant waited until a jury was impaneled and sworn and trial had commenced before making a motion to dismiss at the close of the prosecution's proofs on the basis that the victim of the assault, knowing the revolver to be unloaded, was not placed in fear, and, thus, an assault had not been made. (T pp 90-91). Appendix G.

This is not a case where the Defendant's midtrial motion to dismiss "could only be made after the factual development at trial." *United States* v *Scott*, 437 US 112; 57 L Ed 2d 88, (Justice Brennen's dissenting opinion). Indeed, the Defendant had made an identical motion at the conclusion of the preliminary examination before the case had even been bound over to Circuit Court for trial. Appendix F. The Defendant, however, has nothing to gain by making a pretrial motion to quash the Information. If the trial court grants the motion to quash before trial, then the prosecution can appeal as of right to the Michigan Court of Appeals, *Jackson County Prosecutor* v *Court of Appeals*, 394 Mich 529; 232 NW2d 173 (1975), and the Defendant would then be required to go to trial on the Information. By following the obvious tactic of delaying any motion to quash until jeopardy has attached, an erroneous decision by the trial court cannot be appealed by the prosecution. On the other hand, a denial of the motion to quash can be appealed by the defendant.

The Michigan Court of Appeals found that the Circuit Court clearly erred in dismissing the charge of Assault With Intent to Murder. Had Defendant filed a timely motion to quash, the trial court's error could be corrected on appeal without any double jeopardy question.

There is no double jeopardy policy served by allowing the defendant to take advantage of the attachment of jeopardy. A defendant's purposeful delay in bringing a motion to quash until jeopardy has attached and the following appeal of the Court's granting of that motion is not evidence of the all powerful State harassing a defendant by repeated attempts to convict. *Green* v *United States*, 355 US 184; 2 L Ed 2d 199; 78 S Ct 221 (1957). It is the Defendant, by the timing of his motion to quash, who makes the decision to withdraw the case from the first impaneled triers-of-fact, and who thereby decides not to go to the first impaneled jury and possibly obtain an acquittal.

Petitioner further contends that a State trial court's mid-trial dismissal on Defendant's motion for directed verdict does not constitute an acquittal under the accepted common law definition of that term. Double jeopardy, being a common law concept, bars retrial only where the dismissal is tantamount to a common law acquittal.

In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Kepner* v *United States*, 195 US 100, 125-126; 49 L Ed 114, 123; 24 S Ct 797 (1904). Justice Frankfurter in delivering the opinion of the Court in *Gore* v *United States*, 357 US 386, 392; 2 L Ed 2d 1405; 78 S Ct 1280 (1958) stated that the concept of double jeopardy is rooted in the history of the common law and is not an evolving concept like due process.

Under the common law, the protection of double jeopardy was inextricably related to trial by jury. As stated in *Crist* v *Bretz*, 437 US 28, 33-35; 57 L Ed 2d 24, 29-31; 98 S Ct 2156 (1978) the reason for holding that jeopardy attaches when the jury is impaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. That interest has its roots in the development of trial by jury in the common law. This Court in *Crist* v *Bretz, supra*, stated that the Fifth Amendment guarantee against double jeopardy derived from English common law, which followed then, as it does now, the relatively simple rule that a defendant has been put in jeopardy only when there has been a conviction or an acquittal — after a complete trial. 437 US at 33; 57 L Ed 2d at 29-30. The *Crist* v *Bretz*, opinion although properly noted, that under the rationale stated in *Green* v *United States*, 355 US 184; 2 L Ed 2d 199; 78 S Ct 221 (1957), that the State should not be allowed to make repeated attempts to convict, the constitutional concept of double jeopardy now provides that a defendant is placed in jeopardy when the jury is sworn.

This above holding in *Crist* v *Bretz, supra*, however, although changing the common law interpretation of when jeopardy attaches, does not change the accepted common law, and thereby constitutional, definition of acquittal. Although jeopardy attached in the instant case, the attachment of jeopardy begins, rather than ends, the inquiry as to whether the double jeopardy clause bars retrial. *Illinois* v *Sommerville*, 410 US 458, 467; 35 L Ed 2d 425; 93 S Ct 1066, 1072 (1973).

Mr. Justice Clifford's dissenting opinion in *Coleman* v *Tennessee*, 97 US 509, 520; 24 L Ed 1118, 1123 (1879) contains the only discussion in any opinion of this Court concerning the common law definition of an "acquittal" which would bar retrial under the double jeopardy clause. Mr. Justice Clifford stated:

> Jeopardy, in the constitutional sense, arises when the accused is put to trial before a court of competent jurisdiction upon a sufficient indictment, and the prisoner has been legally convicted or acquitted *by the verdict of a jury,* as appears by the record thereof remaining in the court where the verdict was returned. 1 Bish., Cr. Proc. 2d Ed, Sec. 808. (97 US at 520, 24 L Ed at 1123). (Emphasis added).

Mr. Justice Clifford further states that the double jeopardy clause means that a party shall not be tried a second time for the same offense "after he has once been convicted or acquitted of the same *by the verdict of a jury.*" The dissent in *Coleman* goes on to state:

> Borrowed, as that provision was, from the common law, it has everywhere been held to be subject to the same exceptions, limitations and qualifications as were annexed to it by the expounders of the great repository of criminal jurisprudence. Vaux's case, 4 Coke, 400. (97 US at 520; 24 L Ed at 1123).

In *Kepner* v *United States*, 195 US 100, 128; 49 L Ed 114, 124; 24 S Ct 797 (1904) this Court discusses State court opinions which limit jeopardy to a second prosecution after verdict by a jury. The *Kepner* opinion cites *Coleman* v *Tennessee* for the proposition that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him. The *Kepner* opinion then states:

> Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial

> for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit. (195 US at 128; 49 L Ed 114 at 124).

The State jurisdictions discussed in the above quote from *Kepner* would obviously be those states which still followed the common law rule, later abrogated by statute in the states which allowed tria' by the judge sitting without jury. The *Kepner* opinion is, thus, discussing an acquittal by the trial judge when he is sitting in the place of the jury as the trier of fact impaneled to either acquit or convict the defendant. Clearly, this language from *Kepner* cannot be read to change the common law to read that a judge, who is not the trier of fact when presiding over a jury trial, can "acquit" the defendant by granting a motion for directed verdict in the common law sense of that term.

There is much support for Justice Clifford's conclusion in *Coleman* v *Tennessee* which limits the common law definition of acquittal to such a verdict rendered by the jury. See also *People* v *Olcott*, 2 Johns. (NY) 301; 1 Am Dec 168, 172 (1801), *State* v *Solomans*, 6 Yerger (Tenn) 360; 27 Am Dec 469, 471 (1834), *State* v *Hornsby*, 8 Robinson 583; 41 Am Dec 314 (La, 1845). *Hornsby* held that to sustain a plea of *autrefois acquit* the former acquittal must be by verdict of a jury. See also the cases collected at 27 Am Dec 471.

Other earlier cases by this Court are in accord with the above discussion of a common law concept of acquittal for double jeopardy purposes. In *United States* v *Ball*, 163 US 662; 41 L Ed 300; 16 S Ct 1192 (1896) the acquittal which this Court found constituted a double jeopardy bar to a second trial was by verdict of the jury. In *Fong Foo* v *United States*, 369 US 141; 7 L Ed 2d 629; 82 S Ct 671 (1962) this Court found

a double jeopardy bar to retrial where, although the trial court directed that the jury return verdicts of acquittal, it was in fact the jury which returned with the verdict of acquittal.

Later opinions by this Court hold that an acquittal by a judge presiding over a jury trial under Fed Rule Crim Proc 29, unaccompanied by a jury verdict of acquittal, also constitutes a double jeopardy bar to retrial. *United States* v *Sisson*, 339 US 267, 290; 26 L Ed 2d 608, 624; 90 S Ct 2117 (1970), *United States* v *Martin Linen Supply Co*, 430 US 564, 573-574; 51 L Ed 2d 642, 652-653; 97 S Ct 1349 (1977). Neither *Sisson* nor *Martin Linen*, however, discuss how this expanded concept of "acquittal" has been taken from the common law or how this common law concept of acquittal has been abandoned. The *Sisson* opinion in discussing *United States* v *Ball, supra*, and the fact that in *Ball* the acquittal was by the jury and the acquittal in *Sisson* by the judge merely states:

> This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed Rule Crim Proc 29. (399 US at 290; 26 L Ed 2d at 624).

In the *Martin Linen* case this Court discussed the argument that the judge's directed verdict in *Fong Foo* raised a double jeopardy bar to retrial on the basis that the actual acquittal was by verdict of the jury, by citing the rationale in *United States* v *Sisson, supra*, that Rule 29 recognizes no legal distinction between judge and jury with respect with the invocation of the protections of the double jeopardy clause and by stating that an acquittal by the trial judge under Rule 29 whether before the verdict of the jury or after the verdict of the jury should be afforded the same weight. As in *Sisson*, however, the *Martin Linen* opinion again fails to address the rationale for so radically departing from the common law concept of acquittal. The *Martin Linen* opinion in footnote 12 at 430 US

573; 51 L Ed 2d 652 states that where a criminal prosecution is tried to a judge alone there is no question that the double jeopardy clause accords his determination in favor of a defendant full constitutional effect. This statement misses the point addressed in *Kepner* v *United States* that a judge sitting as the trier-of-fact can render an acquittal with the same effect as a jury's acquittal, whereas where the judge is presiding over a jury trial only the jury can render a verdict of acquittal within the common law meaning of that term.

The discussion in the *Martin Linen* opinion rejecting the government's interpretation of the *Fong Foo* case is based on this Court's interpretation of the intent of the framers of Rule 29. *Martin Linen* states that a judge's judgment of acquittal under Rule 29 should not have a different effect based solely on the time of the judgment. The *Martin Linen* opinion notes that the government concedes that the double jeopardy clause would preclude both appeal and retrial of a judge's judgment of acquittal prior to submission of the case to the jury under Rule 29(a). The same is not conceded by the State of Michigan in the instant case on the basis of the above discussion supporting the theory that an acquittal for purposes of the common law can be rendered only by the jury, or by the judge when the judge is sitting in the place of the jury as the trier-of-fact.

There is no Michigan rule comparable to Fed Rule 29. No court rule, statute or case law in Michigan exists to allow the trial judge to render a verdict of acquittal after a jury verdict. The double jeopardy issue thus framed in the instant case cannot be disposed of by harking back to the desired objective of the equal application of Fed Rule Crim Proc 29. Rather, this double jeopardy issue must be resolved on the proper common law constitutional standards of whether the trial court's dismissal in the instant case constituted an acquittal as that term is defined in the common law.

The *Martin Linen* decision after citing *Ball* for the proposition that a "verdict of acquittal could not be reviewed" 430 US 571; 51 L Ed 2d 651 went on to frame the following issue:

> Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. (430 US 571; 51 L Ed 2d 651).

This new definition of acquittal from *Martin Linen* is supported by neither citation to earlier opinions of this Court nor common law practice. While the *Martin Linen* decision may be justified in light of Fed Rule 29 this new definition of acquittal without a proper basis to support it cannot justify such a vast departure from the accepted common law definition of acquittal which, absent Fed Rule 29, must be found to be still controlling in state courts.

The ruling in *Sisson* was interpreted by this Court in *United States* v *Wilson*, 420 US 332, 349-350; 43 L Ed 2d 245; 95 S Ct 1013 (1975), and *Serfass* v *United States*, 420 US 377, 392-393; 43 L Ed 2d 265, 276-277;95 S Ct 1055 (1975). The *Wilson* and *Serfass* interpretations of *Sisson* imply that the *Sisson* decision is not bottomed on an interpretation of the constitutional principle of double jeopardy. The *Wilson* case states that *Sisson* was no authority for the proposition that the government cannot constitutionally appeal any post verdict order that would have been an unappealable acquittal.

The *Serfass* opinion states that *Sisson* did not intend to express an opinion with respect to the constitutionality of an appeal by the United States from the order entered by the District Court in that case. Thus, the *Martin Linen* decision's adoption of the reasoning set down in *Sisson* must be limited to appeals by the United States from acquittals under Fed Rule 29, and cannot be extended to control appeals by the

government in State court cases in which the concept of acquittal must be interpreted in light of the controlling common law definition of that term.

In the most recent opinion by this Court on double jeopardy, *United States* v *DeFrancesco*, ___ US ___; ___ L Ed 2d ___; ___ S Ct ___; 28 Cr L 3017 (No. 79-567, December 9, 1980), although the Court was not called upon to reconsider the nature of an acquittal which would give rise to a double jeopardy bar, nevertheless implicitly recognized the only type of acquittal recognized at common law:

> We necessarily afford absolute finality to a jury's *verdict* of acquittal. 28 Cr L 3021 * * * ... Whether a criminal sentence, once pronounced is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. (28 Cr L 3022).

The dissent in *DiFrancesco*, curiously citing *Martin Linen*, states that a "verdict of acquittal represents the *factfinder's* conclusion that the evidence does not warrant a finding of guilty," and that, "in both acquittals and sentences, the trier of fact makes a factual adjudication." (28 Cr L 3026). When a jury is impaneled the judge is not the factfinder.

The dissent in *DiFrancesco* also notes that the purpose of insulating a verdict of acquittal from further proceedings is a concern that defendants not be subjected to government oppression and to protect against retrials leading to erroneous guilty verdicts. 28 Cr L 3027. In the instant case, however, since the case was not submitted to the jury, the prosecution has not been afforded its "one fair opportunity" to convict the defendant, the trial judge being unable to render a verdict of guilty on Defendant's motion to quash the Information. *Burks* v *United States*, 437 US 1, 16; 57 L Ed 2d 1, 12; 98 S Ct 2141 (1978). Further, it was the defendant, by waiting to

bring his motion to quash until the jury had been sworn, who through his motion retained primary control over the course to be followed, *United States* v *Dinitz*, 424 US 600; 47 L Ed 2d 267; 96 S Ct 1075, 1081 (1976) and, through his own choice in the timing of his motion, voluntarily relinquished the chance to end the dispute then and there with an acquittal upon submission to the jury. *Illinois* v *Sommerville*, 410 US 458, 475; 35 L Ed 2d 425; 93 S Ct 1066, 1075 (1975) (White J., dissenting opinion). See also *United States* v *Jorn*, 400 US 470, 484-485; 27 L Ed 2d 543, 556; 91 S Ct 547 (1971).

In the opinion below of the Michigan Court of Appeals it was held that "although based on the trial court's erroneous interpretation of relevant legal principles" the Court's rulings nonetheless amounted to acquittals on the merits, citing *United States* v *Scott*, 437 US 82; 57 L Ed 2d 65; 98 S Ct 2187 (1978) and *Sanabria* v *United States*, 437 US 54; 57 L Ed 2d 43; 98 S Ct 2170 (1978). The *Scott* opinion, however, merely reiterates some of the principles set down the previous term in *United States* v *Martin Linen, supra*, to the effect that the government could not appeal the granting of a motion to acquit pursuant to Fed Rule Crim Proc 29 where the judge's ruling represents a resolution of some or all of the factual elements of the offense charged. *United States* v *Scott*, 437 US at 90, 96-97; 57 L Ed 2d at 73-74, 77-78. Where Rule 29 is not applicable the above discussed common law definition of acquittal is controlling in the application of the double jeopardy clause and in the instant case requires the finding that the Circuit Court's granting of Defendant's midtrial motion to quash the Information does not constitute a bar to retrial.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD J. GRANT P14272
PROSECUTING ATTORNEY

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Dated: January 6, 1981

APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF MICHIGAN
CR 26-132

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

OTIS LEE SMITH,
Defendant-Appellee.

SC: 63048

COA: 77-4427

LC: 77-011043 FY

Present the Honorable MARY S. COLEMAN, Chief Justice, THOMAS GILES KAVANAGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 20th day of October in the year of our Lord one thousand nine hundred and eighty.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and

correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 20th day of October in the year of our Lord one thousand nine hundred and eighty.

(s) Colin R. Davis
Deputy Clerk

APPENDIX B

THE COURT OF APPEALS OF THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v No. 77-4427

OTIS LEE SMITH,
Defendant-Appellee.

Present the Honorable Robert B. Burns, Presiding Judge. Daniel F. Walsh, Martin E. Clements, Judges

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the thirtieth day of March in the year of our Lord one thousand nine hundred and seventy-nine.

In this cause an opinion reversing certain rulings of the trial court was issued and the Court, on its own motion, having granted rehearing to consider the double jeopardy implications of the prosecution's appeal, and due consideration thereof having been had by the Court,

IT IS ORDERED that the opinion previously issued in this cause (rel'd August 8, 1978,) be, and the same is hereby RESCINDED and of no further force and effect.

IT IS FURTHER ORDERED that the prosecutor's appeal in this cause be, and the same is hereby DISMISSED. *United*

States v *Scott*, ____ US ____; 98 S Ct 2187; 57 L Ed 2d 65 (1978), *Sanabria* v *United States*, ____ US ____; 98 S Ct 2170; 57 L Ed 2d 43 (1978), *People* v *Keith Lester*, 78 Mich App 661; 261 NW2d 33 (1977).

See attached opinion.

STATE OF MICHIGAN – ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 16th day of April in the year of our Lord one thousand nine hundred and seventy-nine.

(s) Ronald L. Dzierbicki
Clerk

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

OTIS LEE SMITH,

Defendant-Appellee.

April 16, 1979
On Rehearing
No. 77-4427

BEFORE: R.B. Burns, P.J., Walsh and Martin E. Clements, JJ. WALSH, J.

The prosecutor appeals from the trial court's dismissal of three charges arising out of the defendant's unsuccessful escape from the custody of a prison guard. A preliminary statement of facts is necessary to our discussion.

Defendant, an inmate at Jackson Prison, had been transferred to Foote Memorial Hospital in Jackson for medical treatment. During his stay there he was in the custody of prison guards.

The incident occurred when Officer Eldridge, a prison guard, brought another inmate into the defendant's ward. Once in the room, Eldridge, pursuant to prison regulations, proceeded to the restroom and secretly unloaded his revolver. When Eldridge returned, the second inmate created a disturbance, apparently distracting the officer sufficiently to allow the defendant to obtain the revolver. Thereupon, the defen-

dant pointed the gun at Eldridge and told him not to move or he would kill him. When Eldridge stepped toward him, the defendant pointed the revolver at the guard's chest and twice pulled the trigger.

After Eldridge wrested the gun from him, the defendant ran out of the room and down the corridor. Eldridge pursued, tackled the defendant and returned him to the ward.

The information brought against the defendant charged him with assault with intent to commit murder, MCL 750.83; MSA 28.278, possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), prison escape, MCL 750.193; MSA 28.390, and attempted murder, MCL 750.91; MSA 28.286.

At the close of the prosecution's presentation of its proofs to the jury the defendant moved for directed verdicts of acquittal. The trial court dismissed the assault charge on the ground that Eldridge, knowing the revolver to be unloaded, knew that the defendant did not have the means to assault him. The attempted murder count was dismissed on the trial court's ruling that the defendant's act did not fall within the nature of the acts prohibited by the statute. The lower court also ruled that the people had not proven a completed escape, and, therefore, instructed the jury under the general attempt statute, MCL 750.92; MSA 28.287, rather than the prison escape statute.

Thus, the jury was instructed only on the charges of attempted prison escape and possession of a firearm in the commission of a felony. The trial court declared a mistrial and discharged the jury when they were unable to agree on a verdict.

On appeal the prosecutor raises two issues:

(1) Did the trial court err in dismissing the counts charging assault with intent to murder and attempted murder?

(2) Did the trial court err by instructing the jury only under the general attempt statute rather than under the prison escape statute?

I

The statutory provisions involved in the first issue are as follows:

> "Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years." MCL 750.83; MSA 28.278.
>
> "Any person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, *or by any means not constituting the crime of assault with intent to murder,* shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years." MCL 750.91; MSA 28.286. (Emphasis added.)

Two things are apparent on the faces of the respective statutes. One is that they define mutually exclusive crimes. *See, People* v *Cooper*, 58 Mich App 284; 227 NW2d 319 (1975), rev'd on other grounds 398 Mich 450 (1976). The other is that the attempt statute, MCL 750.91; MSA 28.286, is designed to proscribe and punish those attempts at murder not within the ambit of the assault with intent to murder statute, MCL 750.83; MSA 28.278, because of the lack of an assault. Perkins, Criminal Law (2d ed 1969), p 119.

Given the plain language of the attempted murder statute, we find that the trial court clearly erred in dismissing both counts. Insofar as the evidence amply demonstrated that the defendant tried to murder the prison guard, he necessarily

violated one of the above provisions: if by assault, he was guilty of assault with intent to murder; if "by *any* means not constituting the crime of assault with intent to murder", he was guilty of attempted murder.

The question remains as to which statute applied to the defendant's actions. Resolution of that issue turns on whether an assault was committed where the defendant, thinking that the revolver was loaded, attempted to discharge it into the chest of the prison guard, who knew that the weapon was not loaded.

In the recent case of *People* v *Sanford*, 402 Mich 460; ____ NW2d ____ (1978), the Supreme Court defined criminal assault as follows:

> "We adopt what Perkins on Criminal Law (2d ed), p 117, says is the majority rule, namely "a simple criminal assault 'is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.' " " *Id.* at 479.

In the instant case the victim could not have had a reasonable apprehension of receiving an immediate battery because he knew that the gun was incapable of being fired. If the defendant was guilty of an assault it was because he attempted a battery.

There is little doubt that defendant attempted battery when he tried to discharge the revolver into the guard's chest. However, the defendant argues that he nevertheless was not guilty of an assault because he lacked the "present ability" to carry out the battery. We believe that his argument misconstrues the case law upon which he relies.

Confusion regarding the so-called "present ability" requirement derives from certain language in the Supreme Court's opinion in *People* v *Lilley*, 43 Mich 521; 5 NW 982 (1880).

See, People v *Cooper, supra*. In order to illustrate the inaccuracy of counsel's interpretation of that case, we cite the passage in question in its entire context.

> "The instruction as given would seem to lay down the general proposition "that any intent to commit violence accompanied by acts which, if not interrupted, will be followed by bodily injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance." Now there may be an intent to commit violence, and this accompanied by acts preparatory thereto, which if followed up would clearly constitute an assault, yet owing to the distance and surrounding circumstances, no possible assault would have been committed. Thus, one with a direct intent to do grievous bodily harm may purchase a deadly weapon, or having one he may, with like intent, put it in a condition to use with deadly effect. Yet if the act stop here, it may as a general proposition be said the party could not be convicted of an assault, and this irrespective of what may have caused the party to proceed no farther in the attempt. *Other facts must be added, and this we shall see must be a present ability to carry out the intent.* The act done must have been sufficiently proximate to the thing intended. It may be so remote, although a distinct and essential act, coupled with the intent, as to fall far short of constituting an assault. The act done must not only be criminal but it must have proceeded far enough towards a consummation thereof, and this must necessarily be a question for the jury under proper instructions. 1 Bishop Cr. L., ch. 26; also §323. So, clearly, where the intent is formed and some act done in performance thereof, but the party voluntarily abandons his purpose, or is pre-

> vented from proceeding farther, and this while at a distance too great to make an actual assault, he could not be convicted of an assault." *Id.* at 524-525 (emphasis added).

It is the italicized sentence that purportedly established the "present ability" requirement. For the reasons hereinafter stated we reject the argument that an assault conviction requires proof that the defendant not only attempted a battery but also possessed the actual means to inflict that battery.

First, given the context of the "present ability" language in *Lilley*, it is apparent that the Court was discussing the necessity of the criminal act being sufficiently proximate to the intended battery to constitute an attempt. *Lilley* did not involve the question whether the defendant had the actual means to execute the battery, but whether the defendant's acts had proceeded far enough toward that end to constitute an assault. To construe *Lilley* as supporting the instant defendant's contention is to lift a sentence totally out of context and give it a meaning unintended by its author.[1] We decline to do so.

Second, we have been unable to discover any Michigan case in which an assault conviction based upon an attempted battery was precluded merely because of the factual impossibility of executing the battery. *But cf. People* v *Doud*, 223 Mich 120; 193 NW 884 (1923).[2]

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[1]For a discussion suggesting the origin and development of the misunderstanding surrounding the "present ability" requirement, see Perkins, Criminal Law (2d ed 1969) p 120.

[2]In a particularly cryptic opinion the *Doud* Court seemed to hold that where a defendant fires a gun at another, mistakenly believing the weapon to be loaded, he may be convicted of a simple

(continued next page)

Third, the rule urged upon us by the defendant has no rational foundation in law or in policy. Factual impossibility has never been a defense to a criminal attempt. *People* v *Tinskey*, 394 Mich 108; 228 NW2d 782 (1975), *People* v *Jones*, 46 Mich 441; 9 NW 486 (1881). Furthermore, we perceive no good reason for exculpating a defendant charged with attempted battery because fortuitous circumstances unkown to him prevented his achieving his criminal object. The instant case amply demonstrates the absurdity of such a rule.

Accordingly, we hold that if a defendant intends to commit a battery and perpetrates acts sufficiently proximate to that end to constitute an attempt[3], he is guilty of a criminal assault notwithstanding the absence of his actual present ability[4] to commit the battery. Thus, insofar as the evidence presented was sufficient to establish that the defendant committed an assault, the trial court correctly dismissed the count charging attempted murder, *People* v *Cooper, supra*, but erred by refusing to instruct the jury on the charge of assault with intent to commit murder.

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assault but not a felonious assault. The Court did not favor us with any reasoning, but merely prefaced its holding with citations to a number of cases from foreign jurisdiction. Insofar as *Doud* involved a charge of felonious assault, which it apparently distinguished from simple assault in the manner already noted, we find its applicability limited to the precise issue that it addressed. See CJI, Assault — Commentary, pp 17-27.

[3]See *People* v *Coleman*, 350 Mich 268; 86 NW2d 281 (1957) for a discussion concerning the degree of consummation necessary to constitute an attempt.

[4]In so holding we are not eliminating the "present ability" requirement mentioned in *Lilley* and more recently in *People* v *Sanford*, 402 Mich 460; 265 NW2d 1 (1978); we are merely construing and

(continued next page)

II

The trial court refused to instruct for possible conviction of prison escape under MCL 750.193; MSA 28.390, because it found that Section 3 of that statute did not prohibit attempted escapes. We need not address the precise issue raised by that ruling because we find that the defendant's attempted escape was prohibited by Section 1 of the above provision.

The statute under discussion reads as follows:

> "Sec. 193. (1) Any person, being imprisoned in any prison of this state for any term, who shall break prison and escape, or break prison though no escape be actually made, or shall escape, or shall leave the prison without being discharged from the prison by due process of law, or shall attempt to break prison or escape therefrom, shall be guilty of a felony, punishable by further imprisonment to be served after the termination, pursuant to law, of any sentence or sentences then being served. Such prisoner who shall break prison or escape or attempt to break prison or attempt to escape as aforesaid, shall be charged with that offense and tried in the courts of the county wherein are located the administrative offices of the prison or other penal facility to which the prisoner was committed or transferred, at the time of the breaking, escape, or attempt to break or escape.
>
> "(2) The word "prison" as used in this section shall include any Michigan state prison, penitentiary,

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applying it in a manner consistent with the intent of the authors of *Lilley*, with the historic common law definition of assault, and with common sense.

reformatory, state house of correction, camp constructed and maintained under the provisions of Act No. 274 of the Public Acts of 1949, as amended, being section 798.351 of the Compiled Laws of 1948, or any penal camp, except probation camps or probation recovery camps, and shall further include the grounds, farms, shops, road camps or places of employment operated by such institution or under control of the officers thereof, or the department of corrections, or of any police officers of this state, or of other persons authorized by the department to have prison inmates under their care, custody or supervision, either in an institution or outside an institution, whether for the purpose of work or medical care or otherwise.

"(3) Escaping from the lawful custody of any guard or prison official or employee while outside the confines of such prison shall be deemed to be a violation of this section. A person who is released from prison under a work pass program and who violates the terms of such release or who fails to return to his place of imprisonment within the time provided is guilty of a violation of this section. Any person violating the conditions of his parole shall not be deemed to be an escapee under the amendatory provisions of this act. As amended P.A. 1955, No. 264, § 1, Eff. Oct. 14; P.A. 1956, No. 6, § 1, Imd. Eff. March 9; P.A. 1958, No. 215, § 1, Eff. Sept. 13; P.A. 1967, No. 103, § 1, Eff. Nov. 2." MCL 750.193; MSA 28.390."

Section 1 of the above statute prohibits *inter alia* any "attempt to break prison or escape therefrom". By refusing to instruct the jury on anything but attempted escape under the general attempt statute, MCL 750.92; MSA 28.287, the trial

court implicitly ruled that no violation of Section 1 had been demonstrated. In view of the clarity with which that section includes attempts to escape from prison, we must assume that the court found that Foote Hospital did not constitute a "prison" as defined by Section 2. That finding was erroneous.

In pertinent part, the statute defines a prison, *inter alia*, as including "the grounds ... under control of ... persons authorized by the department to have prison inmates under their care, custody or supervision ... outside an institution ... for the purpose of ... medical care ..." Under that definition the defendant was in prison at the time of the incident; hence, his actions were prohibited by Section 1 of the statute.

III

Although based on the trial court's erroneous interpretation of relevant legal principles, the rulings regarding the assault with intent to commit murder, attempted murder, and prison escape charges nonetheless amounted to acquittals on the merits on those charges. The trial court evaluated the prosecution's evidence and determined that it was legally insufficient to support convictions of those offenses. The double jeopardy clause bars government appeal from such determinations. *United States* v *Scott*, ____ US ____; 98 S Ct 2187, 2197; 57 L Ed 2d 65, 78 (1978). When a criminal defendant has been acquitted, retrial on the same offense is barred even if the legal ruling underlying the acquittal was erroneous. *Sanabria* v *United States*, ____ US ____; 98 S Ct 2170, 2179; 57 L Ed 2d 43, 54 (1978), *Fong Foo* v *United States*, 369 US 141; 82 S Ct 671; 7 L Ed 2d 629 (1962). The essential character of an acquittal is not altered depending on whether it results from an erroneous evidentiary ruling or an erroneous

interpretation of governing legal principles. *United States* v *Scott, supra*, at ____; 98 S Ct at 2197; 57 L Ed 2d at 79.

In this case, defendant did not elect to seek termination of the trial on grounds unrelated to his guilt or innocence of the charged offenses. Compare *United States* v *Scott, supra*. On the contrary, the trial court's rulings led to erroneous resolutions in defendant's favor on the merits of these charges. The double jeopardy clause absolutely bars a second trial on the charges to which those rulings were addressed. *Sanabria* v *United States, supra*, at ____; 98 S Ct at 2186; 57 L Ed 2d at 63.

In *People* v *Keith Lester*, 78 Mich App 661; 261 NW2d 33 (1977), this Court found that the defendant had been acquitted and that the prosecutor's appeal was barred by the double jeopardy provisions of the federal and state constitutions. Although *Lester* cited *United States* v *Jenkins*, 420 US 358; 95 S Ct 1006; 43 L Ed 2d 250 (1975), which was overruled by the Supreme Court in *United States* v *Scott, supra*, the result in *Lester* was fully supported by the Supreme Court's holdings in the above cited cases. Under the *Lester* holding, the prosecution's appeal in the instant case is barred by the double jeopardy clauses of the federal and Michigan constitutions. Also see *People* v *Killingsworth*, 80 Mich App 45; 263 NW2d 278 (1977).[5]

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[5]The instant case was argued before this Court in June 1978. At that time the Court considered all issues raised by the parties. The double jeopardy implications of the appeal were not discussed by the parties. An opinion was issued.

On June 14, 1978, the United States Supreme Court decided several cases dealing with various aspects of the double jeopardy clause. Included were *Sanabria* v *United States, supra*, and *United States* v *Scott, supra*. In light of those cases, this Court, on its own motion, granted rehearing in the instant case to allow discussion of the double jeopardy implications of this prosecution appeal.

(continued next page)

For the foregoing reasons the prosecution's appeal in this case must be and hereby is dismissed.

(continued from previous page)

Publication of the original opinion, which had been released to the parties, was held in abeyance pending resolution of this issue. Only this amended opinion will be published.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant.

v

OTIS LEE SMITH,

Defendant-Appellee.

No. 77-4427
l. ct. no.
77-011043 FY

Present the Honorable Robert E. Burns, Presiding Judge, Daniel F. Walsh, Martin E. Clements, Judges

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN. Held at the Court of Appeals in the City of Grand Rapids on the first day of September in the year of our Lord one thousand nine hundred and seventy-eight.

In this cause the Court on its own motion grants rehearing limited to the following issue: whether this Court may order that the assault with intent to commit murder, MCL 750.83; MSA 28.278, and prison escape, MCL 750.193; MSA 28.390, charges be reinstated and that defendant be retried on those charges, in light of the trial court's rulings that those charges did not lie under the facts presented by the prosecution.

IT IS ORDERED that the parties have 20 days after certification of this order to file briefs on this issue for submission to this Court without further oral argument. We direct the parties to the following cases which discuss the double jeopar-

dy ramifications of the relief ordered in this Court's August 8, 1978, opinion in this cause: *Burks* v *United States*, ____US ____; 98 S Ct 2141; 57 L Ed 2d 1 (1978), *Sanabria* v *United States*, ____ US ____; 98 S Ct 2170; 57 L Ed 2d 43 (1978), *United States* v *Scott*, ____ US ____; 98 S Ct 2187; 57 L Ed 2d 65 (1978), *People* v *Keith Lester*, 78 Mich App 661; 261 NW2d 33 (1977), *People* v *Killingsworth*, 80 Mich App 45; 263 NW2d 278 (1977).

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause: that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing this 11th day of September in the year of our Lord one thousand nine hundred and seventy-eight.

(s) Ronald L. Dzierbicki

APPENDIX E

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant.

v

August 8, 1978
No. 77-4427

OTIS LEE SMITH,

Defendant-Appellee.

BEFORE: R.B. Burns, P.J., Walsh and Martin E. Clements, JJ. WALSH, J.

The prosecutor appeals from the trial court's dismissal of three charges arising out of the defendant's unsuccessful escape from the custody of a prison guard. A preliminary statement of facts is necessary to our discussion.

Defendant, an inmate at Jackson Prison, had been transferred to Foote Memorial Hospital in Jackson for medical treatment. During his stay there he was in the custody of prison guards.

The incident occurred when Officer Eldridge, a prison guard, brought another inmate into the defendant's ward. Once in the room, Eldridge, pursuant to prison regulations, proceeded to the restroom and secretly unloaded his revolver. When Eldridge returned, the second inmate created a disturbance, apparently distracting the officer sufficiently to allow the defendant to obtain the revolver. Thereupon, the defendant pointed the gun at Eldridge and told him not to move or he would kill him. When Eldridge stepped toward him, the

defendant pointed the revolver at the guard's chest and twice pulled the trigger.

After Eldridge wrested the gun from him, the defendant ran out of the room and down the corridor. Eldridge pursued, tackled the defendant and returned him to the ward.

The information brought against the defendant charged him with assault with intent to commit murder, MCL 750.83; MSA 28.278, possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), prison escape, MCL 750.193; MSA 28.390, and attempted murder, MCL 750.91; MSA 28.286.

At the close of the prosecution's presentation of its proofs to the jury the defendant moved to dismiss the charges of assault with intent to murder and attempted murder. The trial court dismissed the former on the ground that Eldridge, knowing the revolver to be unloaded, knew that the defendant did not have the means to assault him. The latter count was dismissed on the trial court's ruling that the defendant's act did not fall within the nature of the acts prohibited by the statute. The lower court also ruled that the people had not proven a completed escape, and, therefore, instructed the jury under the general attempt statute, MCL 750.92; MSA 28.287, rather than the prison escape statute.

Thus, the jury was instructed only on the charges of attempted prison escape and possession of a firearm in the commission of a felony. The trial court declared a mistrial and discharged the jury when they were unable to agree on a verdict.

On appeal the prosecutor raises two issues:

(1) Did the trial court err in dismissing the counts charging assault with intent to murder and attempted murder?

(2) Did the trial court err by instructing the jury only under the general attempt statute rather than under the prison escape statute?

I

The statutory provisions involved in the first issue are as follows:

> "Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years." MCL 750.83; MSA 28.278.
>
> "Any person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, *or by any means not constituting the crime of assault with intent to murder*, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years." MCL 750.91; MSA 28.286. (Emphasis added.)

Two things are apparent on the faces of the respective statutes. One is that they define mutually exclusive crimes. *See*, *People* v *Cooper*, 58 Mich App 284; 227 NW2d 319 (1975), rev'd on other grounds 398 Mich 450 (1976). The other is that the attempt statute, MCL 750.91; MSA 28.286, is designed to proscribe and punish those attempts at murder not within the ambit of the assault with intent to murder statute, MCL 750.83; MSA 28.278, because of the lack of an assault. Perkins, Criminal Law (2d ed 1969), p 119.

Given the plain language of the attempted murder statute, we find that the trial court clearly erred in dismissing both counts. Insofar as the evidence amply demonstrated that the

defendant tried to murder the prison guard, he necessarily violated one of the above provisions: if by assault, he was guilty of assault with intent to murder; if "by *any* means not constituting the crime of assault with intent to murder", he was guilty of attempted murder.

The question remains as to which statute applied to the defendant's actions. Resolution of that issue turns on whether an assault was committed where the defendant, thinking that the revolver was loaded, attempted to discharge it into the chest of the prison guard, who knew that the weapon was not loaded.

In the recent case of *People* v *Sanford*, 402 Mich 460; ____ NW2d ____ (1978), the Supreme Court defined criminal assault as follows:

> "We adopt what Perkins on Criminal Law (2d ed), p 117, says is the majority rule, namely "a simple criminal assault 'is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.' " " *Id.* at 479.

In the instant case the victim could not have had a reasonable apprehension of receiving an immediate battery because he knew that the gun was incapable of being fired. If the defendant was guilty of an assault it was because he attempted a battery.

There is little doubt that defendant attempted battery when he tried to discharge the revolver into the guard's chest. However, the defendant argues that he nevertheless was not guilty of an assault because he lacked the "present ability" to carry out the battery. We believe that his argument misconstrues the case law upon which he relies.

Confusion regarding the so-called "present ability" requirement derives from certain language in the Supreme Court's

opinion in *People* v *Lilley*, 43 Mich 521; 5 NW 982 (1880). *See*, *People* v *Cooper*, *supra*. In order to illustrate the inaccuracy of counsel's interpretation of that case, we cite the passage in question in its entire context.

> "The instruction as given would seem to lay down the general proposition "that any intent to commit violence accompanied by acts which, if not interrupted, will be followed by bodily injury, is sufficient to constitute an assault, although the assailant may not be at any time within striking distance." Now there may be an intent to commit violence, and this accompanied by acts preparatory thereto, which if followed up would clearly constitute an assault, yet owing to the distance and surrounding circumstances, no possible assault would have been committed. Thus, one with a direct intent to do grievous bodily harm may purchase a deadly weapon, or having one he may, with like intent, put it in a condition to use with deadly effect. Yet if the act stop here, it may as a general proposition be said the party could not be convicted of an assault, and this irrespective of what may have caused the party to proceed no farther in the attempt. *Other facts must be added, and this we shall see must be a present ability to carry out the intent.* The act done must have been sufficient proximate to the thing intended. It may be so remote, although a distinct and essential act, coupled with the intent, as to fall far short of constituting an assault. The act done must not only be criminal but it must have proceeded far enough towards a consummation thereof, and this must necessarily be a question for the jury under proper instructions. 1 Bishop Cr. L., ch. 26; also § 323. So, clearly, where the intent is formed and some act done in performance thereof, but the

> party voluntarily abandons his purpose, or is prevented from proceeding farther, and this while at a distance too great to make an actual assault, he could not be convicted of an assault." *Id.* at 524-525 (emphasis added).

It is the italicized sentence that purportedly established the "present ability" requirement. For the reasons hereinafter stated we reject the argument that an assault conviction requires proof that the defendant not only attempted a battery but also possessed the actual means to inflict that battery.

First, given the context of the "present ability" language in *Lilley*, it is apparent that the Court was discussing the necessity of the criminal act being sufficiently proximate to the intended battery to constitute the attempt. *Lilley* did not involve the question whether the defendant had the actual means to execute the battery, but whether the defendant's acts had proceeded far enough toward that end to constitute an assault. To construe *Lilley* as supporting the instant defendant's contention is to lift a sentence totally out of context and give it a meaning unintended by its author.[1] We decline to do so.

Second, we have been unable to discover any Michigan case in which an assault conviction based upon an attempted battery was precluded merely because of the factual impossibility of executing the battery. *But cf. People* v *Doud*, 223 Mich 120; 193 NW 884 (1923).[2]

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[1] For a discussion suggesting the origin and development of the misunderstanding surrounding the "present ability" requirement, see Perkins, Criminal Law (2d ed 1969) p 120.

[2] In a particularly cryptic opinion the *Doud* Court seemed to hold that where a defendant fires a gun at another, mistakenly believing the weapon to be loaded, he may be convicted of simple assault

(continued next page)

Third, the rule urged upon us by the defendant has no rational foundation in law or in policy. Factual impossibility has never been a defense to a criminal attempt. *People* v *Tinskey*, 394 Mich 108; 223 NW2d 782 (1975), *People* v *Jones*, 46 Mich 441; 9 NW 486 (1881). Furthermore, we perceive no good reason for exculpating a defendant charged with attempted battery because fortuitous circumstances unknown to him prevented his achieving his criminal object. The instant case amply demonstrates the absurdity of such a rule.

Accordingly, we hold that if a defendant intends to commit a battery and perpetrates acts sufficiently proximate to that end to constitute an attempt,[3] he is guilty of a criminal assault notwithstanding the absence of his actual present ability[4] to commit the battery. Thus, insofar as the evidence presented was sufficient to establish that the defendant committed an assault, the trial court correctly dismissed the count charging attempted murder, *People* v *Cooper*, *supra*, but erred by refusing to instruct the jury on the charge of assault with intent to commit murder.

(continued from previous page)

but not of felonious assault. The Court did not favor us with any reasoning, but merely prefaced its holding with citations to a number of cases from foreign jurisdiction. Insofar as *Doud* involved a charge of felonious assault, which it apparently distinguished from simple assault in the manner already noted, we find its applicability limited to the precise issue that it addressed. See CJI, Assault — Commentary, pp 17-27.

[3] See *People* v *Coleman*, 350 Mich 268; 86 NW2d 281 (1957) for a discussion concerning the degree of consummation necessary to constitute an attempt.

[4] In so holding we are not eliminating the "present ability" requirement mentioned in *Lilley* and more recently in *People* v *Sanford*, 402 Mich 460; ____ NW2d ____ (1978); we are merely construing and applying it in a manner consistent with the intent of the authors of *Lilley*, with the historic common law definition of assault, and with common sense.

II.

The trial court refused to instruct for possible conviction of prison escape under MCL 750.193; MSA 28.390, because it found that Section 3 of that statute did not prohibit attempted escapes. We need not address the precise issue raised by that ruling because we find that the defendant's attempted escape was prohibited by Section 1 of the above provision.

The statute under discussion reads as follows:

> "Sec. 193. (1) Any person, being imprisoned in any prison of this state for any term, who shall break prison and escape, or break prison though no escape be actually made, or shall escape, or shall leave the prison without being discharged from the prison by due process of law, or shall attempt to break prison or escape therefrom, shall be guilty of a felony, punishable by further imprisonment for not more than 5 years, such term of further imprisonment to be served after the termination, pursuant to law, of any sentence or sentences then being served. Such prisoner who shall break prison or escape or attempt to break prison or attempt to escape as aforesaid, shall be charged with that offense and tried in the courts of the county wherein are located the administrative offices of the prison or other penal facility to which the prisoner was committed or transferred, at the time of the breaking, escape, or attempt to break or escape.
>
> "(2) The word "prison" as used in this section shall include any Michigan state prison, penitentiary, reformatory, state house of correction, camp construed and maintained under the provisions of Act No. 274 of the Public Acts of 1949, as amended, being section 798.351 of the Compiled Laws of

1948, or any penal camp, except probation camps or probation recovery camps, and shall further include the grounds, farms, shops, road camps or places of employment operated by such institution or under control of the officers thereof, or the department of corrections, or of any police officers of this state, or of other persons authorized by the department to have prison inmates under their care, custody or supervision, either in an institution or outside an institution, whether for the purpose of work or medical care or otherwise.

"(3) Escaping from the lawful custody of any guard or prison official or employee while outside the confines of such prison shall be deemed to be a violation of this section. A person who is released from prison under a work pass program and who violates the terms of such release or who fails to return to his place of imprisonment within the time provided is guilty of a violation of this section. Any person violating the conditions of his parole shall not be deemed to be an escapee under the amendatory provisions of this act. As amended P.A. 1955, No. 264, § 1, Eff. Oct. 14; P.A. 1956, No. 6, § 1, Imd. Eff. March 9; P. A. 1958, No. 215, § 1, Eff. Sept. 13; P.A. 1967, No. 103, § 1, Eff. Nov. 2." MCL 750.193; MSA 28.390.

Section 1 of the above statute prohibits *inter alia* any "attempt to break prison or escape therefrom". By refusing to instruct the jury on anything but attempted escape under the general attempt statute, MCL 750.92; MSA 28.287, the trial court implicitly ruled that no violation of Section 1 had been demonstrated. In view of the clarity with which that section includes attempts to escape from prison, we must assume that the court found that Foote Hospital did not constitute a "prison" as defined by Section 2. That finding was erroneous.

In pertinent part, the statute defines a prison, *inter alia*, as including "the grounds . . . under control of . . . persons authorized by the department to have prison inmates under their care, custody or supervision . . . outside an institution . . . for the purpose of . . . medical care . . ." Under that definition the defendant was in prison at the time of the incident; hence, his actions were prohibited by Section 1 of the statute.

Given our disposition of this issue we need not address the other questions implicated by the trial court's ruling on this point.

The trial court's rulings are affirmed in part and reversed in part, and the case is remanded for a new trial.

APPENDIX F

STATE OF MICHIGAN
THE DISTRICT COURT,
THIRTEENTH JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF MICHIGAN,
Complainant,

PRELIMINARY EXAMINATION
77300329FY

v

OTIS LEE SMITH,
Respondent.

BEFORE: Honorable Robert Crary, Jr.
District Judge

Appearances: Ronald Wescott
Assistant Prosecuting Attorney

Douglas Williams
Attorney for Respondent

Otis Smith
Respondent

Recorded by: Florence E. Bray — R-0532
Official Court Reporter

Jackson, Michigan

June 6, 1977 — 9:34 A.M.

* * *

MR. WILLIAMS [Attorney for Defendant]: * * * We have the testimony that Mr. Eldredge believed, or knew for a fact, that his gun was empty. We know for a fact that . . . knowing that this weapon was empty, that . . . that this was not an assault with intent to murder . . . Perhaps a heated discussion. We ask that the assault with intent to murder be dismissed and the escape be dismissed. (PET P 20).

* * *

APPENDIX G

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF JACKSON

PEOPLE OF THE STATE OF MICHIGAN,

v

OTIS LEE SMITH

File Number 77-011043-FY
EXCERPTS OF TESTIMONY BY STIPULATION

At a session of said Court held in the Jackson County Court House, Jackson, Michigan, commencing October 17, 1977.

PRESENT: HONORABLE GORDON W. BRITTEN – P11216
Circuit Judge

& Jury

APPEARANCES:
For the People
MRS. SUSAN VANDERCOOK – P25631
Assistant Prosecuting Attorney

For the Defendant
MR. DOUGLAS L. WILLIAMS – P24728
Adams, Goler & Williams
Attorneys at Law
Jackson, Michigan

* * *

For the Defendant
MR. DOUGLAS L. WILLIAMS – P24728
Adams, Goler & Williams
Attorneys at Law
Jackson, Michigan

* * *

MRS. VANDERCOOK: The people would have no other witnesses, and would rest at this point. (4:01 p.m.)

THE COURT: Are you ready to proceed[?]

MR. WILLIAMS: We have a motion, please, Your Honor.

THE COURT: All right. Take the Jury out, please.

(Whereupon the Jury leaves the Court Room)

THE COURT: Mr. Williams?

MR. WILLIAMS: May it please the Court. We would move at this time, for a directed verdict based on the fact that the Prosecutor has failed to show as according to the Information, that the Defendant did in fact assault a Specialist Eldredge, in an assault that takes place when a person, when the victim believes or has reason to believe that the others – that the other person that is doing the assault can carry out his threat. And in this present incident the alleged victim at the time knew that the gun so pointed at him was empty, and he had no fear of being assaulted. (T 90-91).

* * *

THE COURT: Relative to the motion for a directed verdict of not guilty on the charge of assaulting another with intent to commit murder. Definitions of assault also include the present means of doing such harm; that, of course, is substantive, a test based upon the observations and knowledge that the victim may have at the time of the assault. In the present case the guard knew that this gun was empty. There could have been no means of doing such harm, because this gun was empty, and it could not be an assault to murder; the guard knew it

was empty, and in fact moved toward Mr. Smith, who had the gun in his hand.

The Court finds that Count One does not lie under the facts as proven by the People, and the Court will grant the motion to dismiss Count One. (T 96).

* * *